Supreme Court, U.S.
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No. 97-1294

In The Supreme Court of the United States

OCTOBER TERM 1997

NICHOLAS A. CHIARAMONTE,

Petitioner,

v.

FASHION BED GROUP, INC.,
a division of LEGGETT & PLATT, INC.,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. May Petitioner revive and relitigate the merits of his claim that his employer discriminated against him on account of his age in violation of the Age Discrimination in Employment Act, 29 U.S.C. § 623, by filing a petition for a writ of *certiorari* in this Court after Petitioner previously dismissed the same claim before the applicable state administrative agency voluntarily and with prejudice?

2. Should this Court change the rule it established in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742 (1993), and require a plaintiff in an age discrimination case to present **more** evidence at the summary judgment stage to rebut an employer's showing of a legitimate reason for plaintiff's discharge, when the district court found that no genuine disputes of material fact exist under the **less** stringent standard Petitioner admits the district court applied?

RULE 29.6 LISTING

Respondent Fashion Bed Group is the trade name under which Leggett & Platt, Inc., a publicly owned Missouri corporation, does business. Leggett & Platt, Inc. has no corporate parent, and no domestic subsidiaries other than wholly owned subsidiaries.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

RULE 29.6 LISTING ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

STATUTES INVOLVED vii

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

I. The Issue On Which Petitioner Claims The Circuits Are Split Would Not Affect The Ultimate Outcome Of The Case And Was Not Presented Below. 4

II. Petitioner's Voluntary Dismissal Of The Same Claim With Prejudice Bars Him From Relitigating It Before This Court. 8

III. The Opinion Below Does Not Decide An Important Federal Question In A Way That Conflicts With Any Decision Of This Court 10

A. The decision below does not conflict with this Court's precedents setting the standards for summary judgment. 10

B. The decision below does not conflict with this Court's precedents applying a burden-shifting analysis to employment discrimination cases. 15

CONCLUSION 19

TABLE OF AUTHORITIES

CASES

Anderson v. Baxter Healthcare Corp., 13 F.3d 1120 (7th Cir. 1994) 5

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505 (1986) 10, 11

Arlington Heights v. American National Bank & Trust Co., 72 Ill. App. 3d 744, 391 N.E.2d 108 (1st Dist. 1979) 9

Celotex Corp. v. Cattrett, 477 U.S. 317, 106 S. Ct. 2548 (1986) 11

Emmel v. Coca-Cola Bottling Co., 95 F.3d 627 (7th Cir. 1996) 7

Kremer v. Chemical Construction Corp., 456 U.S. 461, 102 S. Ct. 1883 (1982) 9

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817 (1973) 5, 10, 11, 15, 18, 19

O'Connor v. Coin Caterers, 517 U.S. 308, 116 S. Ct. 1307 (1996) 16, 17

People v. Creek, 94 Ill.2d 526, 447 N.E.2d 330, (1983) ... 9

Sommerville v. United States, 324 F.2d 712 (3d Cir. 1964), *cert. denied* 376 U.S. 909, 84 S. Ct. 663 (1964) 6

St. Mary's Honor Center v. Hicks, 509 U.S. 502, 113 S. Ct. 2742 (1993) 5, 6, 17

The Monrosa v. Carbon Black, Inc., 359 U.S. 180, 79 S. Ct. 710 (1959) 6

Weisguth v. Supreme Tribe of Ben Hur, 272 Ill. 541, 112 N.E. 350 (1916) 9

STATUTES

Age Discrimination in Employment Act, 29 U.S.C. § 623 . i

TREATISES

Stern, Gressman, et al., Supreme Court Practice (7th ed.) at 173 6

STATUTES INVOLVED

29 U.S.C. § 623 Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer --

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age[.]

* * *

Respondent respectfully urges this Court to deny the petition for *certiorari* for the reasons stated below.

STATEMENT OF THE CASE[1]

Petitioner Nicholas Chiaramonte ("Chiaramonte") was the Vice-President of Research and Development for Fashion Bed Group ("FBG"), a Chicago-based manufacturer of brass beds. FBG eliminated Chiaramonte's job in early 1992 in the last of a series of personnel reductions that reduced FBG's total workforce by more than one-third.

John Elting ("Elting"), FBG's President, made all the relevant decisions about Petitioner, including the one to terminate him. When Elting hired him in 1985, Chiaramonte (then age 52) had been working for Dresher, the main competitor of FBG's corporate predecessor (Berkshire). Several years later, Leggett & Platt, Inc. separately acquired Berkshire, Dresher and a third competitor and merged the three companies to create FBG. When FBG merged the competitors' workforces in 1990, it laid off many unneeded workers. Elting chose to retain Chiaramonte (then age 57) rather than Chiaramonte's counterpart from Dresher to head the combined engineering functions of FBG.

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[1]The court of appeals' statement of facts (App. 2-5.) is complete and corrects several of Petitioner's misstatements of facts that the district court found to be undisputed.

In September 1991, Elting appointed Chiaramonte to the newly created position of Vice-President of Research and Development. At the same time, Elting assigned Rob Cummins, an employee who Chiaramonte originally hired at Berkshire, to be Director of Engineering. Chiaramonte's primary task was to lead FBG to new manufacturing methods, while Cummins (who was 34 years old and had far less work experience than Petitioner) was to handle the mundane, day-to-day engineering details.

Integrating the two competitors' manufacturing and administrative operations proved far more difficult than FBG anticipated. Lack of cooperation among employees who previously had been head to head competitors compounded problems with manufacturing equipment and administrative systems. FBG suffered losses in all four quarters of 1991. Rather than earning the $3.6 million profit expected for 1991, FBG lost $6.6 million on sales of $51.2 million. Because of these losses, Elting laid off one-third of FBG's hourly workforce and a handful of salaried employees in late 1991.

Business did not improve in the first two months of 1992: FBG lost an additional $900,000. Salaried employees worried about FBG's future and their own job security. Chiaramonte himself thought that more layoffs were likely; he recognized that there still were "two people in every slot." Elting picked a dozen salaried employees for termination; they ranged in age from 32 to 61. Petitioner was surprised

when Elting chose to include him among this group; Chiaramonte had thought his job was safe.

Elting used three criteria to evaluate FBG's salaried workers: salary, value to FBG and performance. He used salary information from a payroll register that reported workers' salaries, but not their ages. Elting chose to include Petitioner among the dozen salaried positions he eliminated because Chiaramonte's "huge salary" ($73,000 annually) made him a "luxury." Elting decided to retain the younger Director of Engineering both because Cummins did the detail work FBG needed to become profitable and because his salary was $35,440, less than half of Chiaramonte's. Elting passed his decisions along to his corporate superiors to assure that the terminations complied with applicable law. Elting himself delivered the news to Chiaramonte that his termination resulted from the need to "downsize."

Thus, Elting, who hired Petitioner at age 52, retained him at age 57 rather than his counterpart when the companies later merged, and most recently created a new position and promoted him to it at age 58, is the same person who decided to eliminate Petitioner's position when Petitioner was age 59.

REASONS FOR DENYING THE WRIT

Petitioner makes several efforts to articulate the type of "compelling reason" that Supreme Court Rule 10 requires

for granting a writ of *certiorari*. Instead, Petitioner's arguments reveal that this Court should decline to exercise its discretion to quantify the volume of evidence required in an age discrimination case to create a genuine issue of material fact regarding the issue of pretext (Pet. 9-10) for these reasons: 1) what Petitioner poses as a split among the circuits relates only to an issue that would not change the outcome of this case and was not presented to the courts below; 2) Petitioner's voluntary dismissal of his state administrative claim for age discrimination bars him from relitigating the same claim before this Court; and 3) the opinion below does not conflict with any decision of this Court on an "important federal question."

I. The Issue On Which Petitioner Claims The Circuits Are Split Would Not Affect The Ultimate Outcome Of The Case And Was Not Presented Below.

Petitioner contends that the circuits now apply two substantively conflicting formulations -- "pretext" and "pretext plus" -- to describe what evidence a plaintiff must produce to defeat an employer's motion for summary judgment in an age discrimination case. (Pet. 6-10.) Petitioner concedes that the Seventh Circuit applies the evidentiary standard more favorable to Petitioner. (Pet. 7, 12.) Yet the court below concluded that on this record Chiaramonte could not meet even this less stringent test. Even assuming that the circuits do apply differing standards,

Respondent respectfully urges this Court to address that issue in a case where the standard would actually make a difference in the result. Because it would not here, the Court should decline the Petitioner's invitation to grant *certiorari* here to render what would amount to merely an advisory opinion.

Petitioner contends that since this Court's decision in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973), the circuits are in conflict regarding the quantum of evidence a plaintiff must produce to defeat summary judgment in an indirect, "burden shifting" employment discrimination case. According to Petitioner, the lower courts have offered two essentially conflicting formulations in applying this Court's decision in *St. Mary's Honor Center v. Hicks,* 509 U.S. 502, 113 S. Ct. 2742 (1993) ("*St. Mary's*"), to summary judgment motions in age discrimination cases. (Pet. 5-9.)

This Court's opinion in *St. Mary's* leaves open several avenues by which a jury may find discriminatory intent. The courts below have applied these principles in a wide variety of factual circumstances at the summary judgment stage. Petitioner correctly states that the Seventh Circuit has held that this Court's opinion in *St. Mary's* requires only evidence of "pretext." *E.g., Anderson v. Baxter Healthcare Corp.,* 13 F.3d 1120, 1122-24 (7th Cir. 1994). (App. 7, 12.) He contends this test conflicts with that applied by other circuits, which have required that an employee offer

both pretext evidence and additional evidence of discriminatory animus (the so-called "pretext plus" standard). (Pet. 7-9.)

Petitioner mistakenly focuses on the lower courts' use of conflicting language ("pretext" and "pretext plus") in applying *St. Mary's*. However, he does not claim there are inconsistent rulings among the circuits on facts like those in this case. Rather, Petitioner points out other circuits require *still more* evidence than the Seventh Circuit for a plaintiff to defeat his employer's motion for summary judgment than he provided here. (Pet. 7-8.) Chiaramonte does not contend that the outcome of his case would be any different under the purportedly higher standard applied by these other circuits. Thus, even if there were a conflict among the circuits, it would not change the result in cases like this one, where the plaintiff is unable to meet even the easier standard.

In cases such as *Sommerville v. United States*, 324 F.2d 712 (3d Cir. 1964), *cert. denied* 376 U.S. 909, 84 S. Ct. 663 (1964), this Court has declined to issue the type of advisory opinion that Petitioner seeks here. In *Sommerville*, this Court refused to review admittedly conflicting lower court rulings on a recurring issue despite the Government's request, because its resolution of the conflict would have no impact on the result reached below. *See Stern, Gressman, et al.*, Supreme Court Practice (7th ed.) at 173. *Accord, The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184, 79 S. Ct. 710, 713 (1959), *reh'g denied* 359 U.S. 999, 79 S.

Ct. 1115 ("while this Court decides questions of public importance, it decides them in the context of meaningful litigation. . . . Resolution here of the [issue on which the circuits conflict] can await a day when the issue is posed less abstractly.").

Petitioner here never urged the Seventh Circuit to raise its standard for defeating summary judgment to "pretext plus."[2] Rather, Petitioner unsuccessfully argued that he *had* presented enough evidence in response to FBG's motion for summary judgment that a jury reasonably could conclude FBG's reasons were pretextual and [the decisionmaker] lied about the reason for his decision. . . ." (Petitioner's Opening Br. in the Seventh Circuit, 14, 16; Petitioner's Reply Br. in the Seventh Circuit, 5.)[3]

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[2]Similarly, Petitioner argues for the first time the severance agreement and release he signed violated Illinois' Wage Payment Statute and Collection Act. (Pet. 19.) Such new claims should not be the basis for jurisdiction under Sup. Ct. R. 10.

[3]What Petitioner argued below was that a jury might "disbelieve [the decisionmaker's testimony]" and find that FBG's explanations might not "ring true" if the case were tried. This claim was undercut by Petitioner's open embrace of *Emmel v. Coca-Cola Bottling Co.*, 95 F.3d 627 (7th Cir. 1996), where the Seventh Circuit held that the mere possibility that the jury "might not believe" testimony articulating the reasons for the employer's decision does not require a trial; plaintiff must present directly contradictory facts to create a genuine dispute under Fed. R. Civ. P. 56. *Emmel*, 95 F.3d at 634, n.3 (citation omitted).

What Petitioner really wants is not a new "pretext plus" standard; it is higher than the one he already could not meet. Rather, Chiaramonte desires a third opportunity to argue the sufficiency of his evidence under an already favorable "pretext" rule. If this Court does perceive a conflict among the circuits on the issue Petitioner raised, Respondent respectfully urges the Court instead to select a case in which this issue was briefed and ruled upon below, and one in which its resolution would change the result. This is not such a case.

II. Petitioner's Voluntary Dismissal Of The Same Claim With Prejudice Bars Him From Relitigating It Before This Court.

Chiaramonte filed an administrative charge alleging age discrimination with the Illinois Department of Human Rights ("IDHR") in 1992. (Resp. App. 1-4.)[4] In 1995, Chiaramonte moved the Illinois Human Rights Commission ("IHRC") to stay the proceedings on the complaint based on that charge (Resp. App. 5-9) in order to file this federal lawsuit in the Northern District of Illinois. The IHRC complaint is substantively identical to his federal ADEA claim: in both, Petitioner alleges that FBG discriminated

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[4]Respondent's Appendix ("Resp. App.") contains Petitioner's Charge and the other pleadings referred to above. These pleadings do not appear in the Petitioner's Appendix of this case because Petitioner filed his dismissal motion and the IHRC granted it after the Seventh Circuit issued its Opinion.

against him on account of his age based upon the same facts. (Resp. App. 2-4, 5-7.) His state claims remained pending before the state agency, while he prosecuted the instant lawsuit in the federal courts.

The Seventh Circuit affirmed summary judgment on his claims in November, 1997. Chiaramonte then voluntarily filed a motion with the IHRC to dismiss his action, with prejudice, in January, 1998. The IHRC granted Chiaramonte's motion and dismissed the action with prejudice on January 21, 1998. (Resp. App. 10-11.)

Chiaramonte's voluntary dismissal of his complaint in the IHRC **with prejudice** is a nonappealable final adjudication of his claim on the merits under Illinois law. *People v. Creek*, 94 Ill.2d 526, 531-32, 447 N.E.2d 330, 332-33 (1983); *Arlington Heights v. American National Bank & Trust Co.*, 72 Ill. App. 3d 744, 391 N.E.2d 108 (1st Dist. 1979). Chiaramonte thus "abandoned" his age discrimination claim "by his deliberate and voluntary act" and cannot reinstate it before the IHRC. *Weisguth v. Supreme Tribe of Ben Hur*, 272 Ill. 541, 543, 112 N.E. 350, 351 (1916).

Nonetheless, Chiaramonte filed his petition in this Court seeking the very thing he voluntarily surrendered at the IHRC: another adjudication of this same claim. This Court's holding in *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466-67, 102 S. Ct. 1883 (1982), requires federal courts to give the same preclusive effect to state court

judgments that those judgments would be given in the courts of the state from which the judgments emerged. Petitioner's effort to revive the same claim that he recently voluntarily dismissed with prejudice before the state agency presents a fatal jurisdictional bar that should prompt this Court to deny *certiorari*.

III. The Opinion Below Does Not Decide An Important Federal Question In A Way That Conflicts With Any Decision Of This Court

A. The decision below does not conflict with this Court's precedents setting the standards for summary judgment.

Petitioner also contends that the decision below conflicts with this Court's opinions interpreting Fed. R. Civ. P. 56, such as *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505 (1986).[5] The source of Petitioner's disappointment below was not any "basic conflict" between

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[5]Petitioner claims to have found a "basic conflict" between Rule 56 and the "burden shifting approach" crafted in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973). (Pet. 10.) Again, Petitioner did not urge the lower courts to abandon the burden shifting method. Trial courts routinely conclude in these as in other types of cases that there are no genuine disputes concerning the material facts. The record here reveals no reason to think that the *McDonnell Douglas* approach made it any easier for the district court to grant summary judgment on the particular facts here than in other instances where the parties dispute the reasons that specific actions were taken.

Rule 56 and the "burden shifting approach crafted in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973), as Petitioner posits. (Pet. 10.) Rather, what Petitioner replays to this Court is his continuing quarrel not with what standards are appropriate, but with the district court's application of them. Because this case thus presents nothing more than a claim that the trial court made "erroneous factual findings or [misapplied] a properly stated rule of law" a writ of *certiorari* would be inappropriate under SUP. CT. R. 10.

Contrary to Petitioner's claim, neither the district court's rulings nor the Seventh Circuit's decision conflict with the well settled standards for granting summary judgment under Fed. R. Civ. P. 56. *See Celotex Corp. v. Cattrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986) (a party opposing summary judgment must set forth specific facts showing that there is a genuine issue for trial). Both courts below applied *Celotex* as well as *Anderson v. Liberty Lobby*, 477 U.S. 242, 106 S. Ct. 2505 (1986). (Pet. 11.) (App. 5; Supp. App. 7-8.)

The Seventh Circuit did not simply "accept[] financial justification for any termination decision, no matter what other evidence exists of pretext." (Pet. 20.) Rather, the Seventh Circuit, after *de novo* factual review, agreed with the district court that Chiaramonte had no evidence which materially disputed the facts underlying FBG's business justifications. (App. 18-22.) Both courts found it undisputed

that FBG had lost money, and lots of it; both noted Chiaramonte's own recognition that there were two people in every position. This left the real dispute here not about the facts, but management's judgments based upon those facts: that a dozen salaried positions should be eliminated to reduce operating costs; that Chiaramonte's relatively "huge" salary made him one of those who FBG "could get by without;" and that lower cost employees who were performing "mundane" but necessary "detail" work were more essential to retain. (Supp. App. 3-6, 23-24; App. 3-4, 16-19.)[6]

The Seventh Circuit's refusal to let a jury second guess the employer's business judgments is not a standard "under which no plaintiff can prevail." (Pet. 14.) Petitioner could have (had there been any such facts) shown evidence of pretext, or direct evidence of age bias. He did neither. On the facts here, even if a jury concluded that the employer had preferred the "wrong" skills and picked the "wrong" people to retain, its verdict would be the product of different business judgments rather than evidence of age animus. Thus, Petitioner's failure to win this case was the result of

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[6]Petitioner did not argue that this case involved an unsettled but "important question of federal law" that justifies *certiorari* under Rule 10(c). Even if he had made this argument, the district court and the Seventh Circuit agreed that Chiaramonte had not raised **any** dispute about the material facts that prove FBG's legitimate business justifications. They applied the less stringent "pretext" standard, which does not require additional "pretext plus" evidence.

lack of evidence, not the standard applied by the courts below.

Petitioner accuses the Seventh Circuit of failing to mention the age of his alleged "replacement" and not reciting all of the evidence offered to oppose the motion for summary judgment. (Pet. 11, 13.) The district court noted the twenty-plus year age differential between Petitioner and his alleged replacement, who the court of appeals described as "substantially younger" than Petitioner. (Supp. App. 15-16; App. 13.) Moreover, Rule 56 imposes no bookkeeping requirement that courts itemize each piece of evidence presented and explain why each is insufficient to preclude summary judgment. The courts had a complete factual record concerning every one of the topics Petitioner now rehashes, and he points to no error that would be anything more than harmless.[7]

Petitioner's rendering of the facts is deceptive. He misstates FBG's cost savings from its termination of Chiaramonte. Petitioner initially miscalculates FBG's savings as the difference between his own salary and

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[7]See, for example: Pet. 1, 17-18; App. 9-10; Supp. App. 19-20 (speculation that age was a factor by non-decisionmaker who even Chiaramonte admitted said he "didn't know" why the decision had been made); Pet. 4 and App. 17-19 (FBG's decision to cut its salaried personnel costs at the same time its corporate parent paid for consultants to assimilate the merged companies' manufacturing and administrative operations).

Cummins' salary.[8] Petitioner then compounds his mathematical error by adding hyperbole to it, contending that he could demonstrate to a jury by "simple calculations" that "FBG saved nothing" by terminating him. (Pet. 15-16.) Yet he never has disproved FBG's commonsense demonstration that when it terminated Chiaramonte, it stopped paying any of Petitioner's "huge" salary. Finally, Petitioner accuses FBG of "replacing" him more than nine months after his termination, but fails to advise this Court that each of the two alleged "replacements" was 56 years old and earned a salary about half the size of Chiaramonte's.[9]

Finally, the courts below did not "resolve[] conflicts in the evidence" or "conclude[] issues of intent," as Petitioner contends. (Pet. 11.) To the contrary, the trial judge here did no more than he would have at trial: he performed the gatekeeping function under FED. R. EVID. 104(a), and then made the same ruling that would have been appropriate under FED. R. CIV. P. 50(a), that no reasonable jury could interpret the evidence the same way Petitioner

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[8]Cummins earned $35,440 per year; Chiaramonte's annual salary was $73,000. Petitioner mistakenly calculates FBG's savings as the difference between the two, or $40,000. (Pet. 4, 21; App. 4; Supp. App. 6, 25 n.5.)

[9]In February of 1993, FBG hired two 56 year old employees in the engineering department, Robert Demkowicz and James Hacek. Although they were substantially the same age as Chiaramonte, their combined two salaries were about the same as Chiaramonte's single salary.

urges. As the district court put it, "Chiaramonte's argument that FBG lied about its losses and fired a third of its employees for reasons other than financial ones is unreasonable and would not cause a reasonable juror to find that the reduction-in-force was a subterfuge for discriminating against Chiaramonte because of his age." (Supp. App. 24-25.) Nor did the district court have to "interpret . . . statements as to their meaning" (Pet. 15.) to conclude that even if Chiaramonte's evidence were taken as true, it would not be a sufficient basis from which a reasonable juror could infer "that FBG's articulated reasons were a 'cover' for age animus." (Supp. App. 28.)

B. The decision below does not conflict with this Court's precedents applying a burden-shifting analysis to employment discrimination cases.

Petitioner incorrectly claims that the Seventh Circuit erred by "add[ing] an additional step to the burden-shifting formula" this Court established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973), to determine whether the evidence offered by a plaintiff creates a genuine dispute of material fact that requires denial of the employer's motion for summary judgment. (Pet. 11.) The reality is that the Seventh Circuit applied the same burden-shifting principles that the lower courts have applied for the past quarter century. The court also considered the fact that the "same decisionmaker" who eliminated Chiaramonte's position and terminated his employment at age 59 previously

had chosen to hire him (when Chiaramonte was 52 years old) and also to retain him rather than his counterpart in the merger of two competitors' workforces (when Chiaramonte was 57) and to promote him to a higher position (when Chiaramonte was 58).

Contrary to Petitioner's assertion, a court's consideration of the "same decisionmaker" facts does not conflict with this Court's ruling in *O'Connor v. Coin Caterers*, 517 U.S. 308, 116 S. Ct. 1307 (1996). (Pet. 11-12.) No facts concerning a presumption of non-discrimination were presented in *O'Connor*, and no such argument was raised. Rather, *O'Connor* held that the fact that one employee who is protected by the ADEA is replaced by a co-worker who is substantially younger is sufficient proof of one of the four elements of the plaintiff's *prima facie* case.

Petitioner mistakenly suggests that *O'Connor* should be extended to hold that the facts establishing a single element of a *prima facie* case "alone [are] enough to counter-balance any presumption of non-discrimination." (Pet. 13.) However, a plaintiff's establishment of *all* four elements of a *prima facie* case creates only "a rebuttable" inference that an employment decision was based on an illegal discriminatory criterion." 517 U.S. at 311, 116 S. Ct. at 1309. The new rule Petitioner urges thus would deprive the "same decisionmaker" facts of any weight and, in substance, transform the *prima facie* case into the basis for an

irrebuttable presumption. Such a result would fly in the face of *O'Connor*, which reiterates this Court's long-standing holding that the *prima facie* case merely shifts the burden of production to the employer to articulate a legitimate nondiscriminatory reason for its employment decision. 517 U.S. at 311, 116 S. Ct. at 1309-10. In addition, such a rule would conflict with Petitioner's own admission that the "same decisionmaker" facts "may be a defense to a claim of age discrimination." (Pet. 12.)

Contrary to Petitioner's claim, the Seventh Circuit did not give too much weight to these facts. The lower court did not use the circumstantial evidence here -- the identity of the decisionmaker and the timing of his several advancements of Petitioner prior to deciding to eliminate his position -- to make Petitioner carry any heavier a burden than he already held under the circumstances. The rules for this evidentiary "tug of war" between employee and employer remained unchanged here. The inference of discrimination that an employee initially receives by proving the facts that make up a *prima facie* case lasts only until the employer provides legitimate business reasons for its decision. The presumption, as it often is called, then "dissolves." *St. Mary's*, 509 U.S. at 507. Even Petitioner agrees to this familiar summary of the usual burden-shifting analysis. (Petitioner's Opening Brief in the Seventh Circuit, 12.)

Here, the courts below did not depart from the standard burden-shifting approach. (App. 11 *passim*.)

Under the traditional burden shifting analysis, FBG's articulation of legitimate business reasons dissolved the presumption created by Petitioner's *prima facie* case. (Supp. App. 16; App. 12-13.) The Seventh Circuit simply "consider[ed]" the "same decisionmaker" facts in the traditional context of "assessing whether Chiaramonte has met his burden of showing pretext. . . ." (App. 14; *see* App. 14-16.) The Seventh Circuit both found the "same decisionmaker" facts to be undisputed, and also concluded that Petitioner's separate pretext arguments did not preclude summary judgment because they were unsupported by admissible facts.

The court thus rejected Petitioner's arguments that FBG's cost savings were insufficient to motivate the company's decision (App. 16-19) and to show that FBG's reasons did not actually motivate Petitioner's discharge, because Petitioner failed to raise any genuine dispute about the facts on which FBG's business justification were based. These were Petitioner's burdens under the traditional *McDonnell Douglas* analysis, and the court below considered them wholly independent of any presumption of non-discrimination. (App. 19-22.)

"[A]fter a review of all the evidence" the court of appeals concluded that Petitioner "failed to establish a genuine issue of material fact as to whether FBG's proffered reasons for his dismissal were pretextual." (App. 22.) In explaining this conclusion, the court below emphasized that

its result was only "particularly true in light of the presumption of non-discrimination. . . ." *Id.* The Seventh Circuit did not "adjust" the "scales" (Pet. 13) by increasing Petitioner's burden of proof on the pretext issue. Instead, like the district court, it held that Chiaramonte failed to demonstrate a material dispute concerning facts that would (if proved) meet his *McDonnell Douglas* burden. (App. 22; Supp. App. 27.)

CONCLUSION

For each of these reasons, Respondent respectfully urges the Court to deny the Petition for Writ of Certiorari.

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